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IN THE SUPREME COURT OF THE STATE OF IDAHO

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JOSPEH GERDON,

Claimant/Appellant,

vs.

CON PAULOS, INC,

Employer/Respondent,

and

LIBERTY NORTHWEST INSURANCE CORPORATION,

Surety/Respondent,

SUPREME COURT NO. 43234

APPELLANT'S (JOSEPH GERDON) REPLY BRIEF

Appeal from the Industrial
Commission of the State of Idaho

Chairman R.D. Maynard Presiding

Daniel J. Luker
Attorney for Appellant/Claimant
Goicoechea Law Offices, Chtd.
2537 W. State St.
PO Box 6190
Boise, ID 83707

Joseph M. Wager
Attorney for Respondents/Defendants
Law Offices of Kent W. Day
PO Box 6358
Boise, ID 83707

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I. STATEMENT OF THE CASE

Employer/Surety is correct in identifying that the causation standard set out in Idaho Code § 72-451 for psychological injuries is a more rigorous standard than is outlined by Idaho Code title 72 for physical industrial injuries. The Legislature set out a different causation standard in Idaho Code §72-451 for psychological injuries than physical injuries. When addressing a physical injury a Claimant must show that the "injury she claims benefits for is causally related to an accident occurring in the course of employment." ***Shubert v. Macy's West*** ___ Idaho ___ (2015), 343 P.3d 1099, 1107, citing ***Hart v. Kaman Bearing Supply***, 130 Idaho 296, 939 P.2d 1375 (1997). I.C. § 72-451 requires that the Claimant show that the "accident and injury must be the predominant cause as compared to all causes." Under the workers compensation system a Claimant must show with physical injuries simply a causal relationship between the accident and the injury, while with psychological injuries the Claimant must show that the accident and/or related physical injury is the predominate cause of the psychological injury.

This predominant cause standard has been interpreted as requiring the industrial injury and accident to be at least 51% of the cause of the psychological condition. ***Benner vs. Home Depot, Inc.***, 2013 IIC 0002.21 ¶ 92. The Commission and the testimony offered has focused on the effect of the industrial chronic pain injury on the Claimant's psychological wellbeing, but I.C. § 72-451(3) is not so limiting as it requires that the examination of whether "such accident and injury" is the predominant cause. In the workers compensation system the terms "accident" and "injury" have distinct definitions given meaning by the Idaho Legislature. I.C. 72-

102(18)(a)-(c). The Legislature, though imposing a higher standard than in other workers compensation claims, still sought a holistic causation evaluation, not one narrowly focused on one element. Though the issue in this case is narrow, adopting a narrow focus limited to just the evaluation of expert opinions, without addressing the factually relevant context that those opinions were offered in, is error.

II. ARGUMENT AND AUTHORITY

Claimant laid out in his briefing before the Commission that this case is one that turns on the support and interpretation of expert testimony. Employer/Surety wishes to present this matter as one of strictly the evaluation of "expert testimony" to the exclusion of the other evidence in the record, that is inconsistent with the Court's recommendation. The Court has directed that evaluation of evidence, especially credibility of witnesses and opinions is to be based upon "substantial consistency supported by other evidence in the record." ***Clark v. Shari's Management Corp***, 155 Idaho 576, 581, 314 P.3d 632, 637 (2013). Evaluation of the credibility of evidence is not something to be compartmentalized. Such determinations are to be based upon the totality of the evidence in the record. This is a standard that the Commission has routinely used in past cases. ***Melugin v. Ag Express, Inc.***, 2014 IIC 0032.10; ***Brennen v. Selkirk Press, Inc.***, 2012 IIC 0009.18; ***Henry v. Department of Corrections*** 2011 IIC 0045.18; ***Tim Miller v. Adecco*** 2009 IIC 0097.8; ***Resindez v. Challenger Pallet***, 2005 IIC 0246.8. Where the totality of the evidence demonstrates that the Commission's findings and conclusions,

including on credibility, were clearly erroneous, such findings are to be reversed as they were not made on the basis of substantial and competent evidence.

Employer/Surety asserts that Claimant is asking the Court to "second guess" the Industrial Commission's weighing of Dr. Calhoun's testimony, and cites ***Lorca-Merono v. Yokes Washington Foods, Inc,*** 137 Idaho 446, 455, 50 P.3d 461, 470 (2002) for the proposition that such "second guessing" should be expressly rejected. Employer/Surety misstates the standard outlined in ***Lorca-Merono*** when evaluating a Commission's findings regarding expert opinions. In ***Lorca-Merono*** the Referee authored an opinion placing weight on one set of physicians (Drs. Kody, Watkins and Hahn). The Commission did not choose to adopt the opinion authored by the Referee and instead authored its own opinion placing weight instead on Dr. Lindern's opinion. The dispute on appeal was whether the Commission itself had authority to disregard the Referee's unadopted findings. The Court held that the Commission had authority to adopt its own findings and weigh credibility. The Court set out the standard for its evaluation of the Commission's decision as follows:

> The findings of fact made by the referee were merely recommendations to the Industrial Commission. Upon reviewing those findings it could either adopt them or enter its own findings. The Commission need not explain why it did not adopt certain findings recommended by the referee. The Industrial Commission, as the fact finder, is free to determine the weight to be given to the testimony of a medical expert. The Commission is not bound to accept the opinion of a treating physician over that of a physician who merely examined the claimant for the pending litigation. We will not disturb the Commission's conclusion as to the weight and credibility of expert testimony unless such conclusions are clearly erroneous. ***Lorca-Merono***, at 451. (Citations omitted).

The standard which the Court set out is not one which never re-evaluates expert testimonial evidence, but instead evaluates it whether it was "clearly erroneous" to rely upon such evidence. The Court has further clarified when evaluating witnesses before a non-jury tribunal that

> "in determining whether a finding is clearly erroneous this Court does not weigh the evidence as the district court did. The court inquires whether the findings of fact are supported by substantial and competent evidence. This Court will not substitute its view of the facts for the view of the district judge. Evidence is regarded as substantial if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proven." ***Shawver v. Huckleberry Estates, L.L.C.,*** 140 Idaho 354, 360, 93 P.3d 685, 691 (2004). (Citations omitted).

The U.S. Supreme Court has also explained the clearly erroneous standard. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." ***United States v. U.S. Gypsum Co.***, 333 U.S. 364, 395 (1948). The law allows the Court to reexamine the evidence before the Commission including testimonial evidence. Such an examination is to determine whether "a mistake has been committed" or whether the decision reached was one which a reasonable trier of fact could not arrive at. This examination is based on the "entire evidence." If the Court determines that a mistake has been committed, the finding should be reversed, even as to the weight given to a witnesses' testimony.

A. The Industrial Commission's Wholesale Reliance upon Dr. Calhoun's 50/50 Analysis was Clearly Erroneous Based on the Totality of the Evidence, Including Evidence the Commission Found Undisputed and Persuasive, and is Therefore not Based on Substantial and Competent Evidence.

The trier of fact is required to examine all of the evidence when evaluating credibility. Employer/Surety seeks to take Claimant's Counsel's own words out of context regarding the proper evaluation of the Claimant's pre-existing psychological condition. (Employer/Surety's Responsive Brief, p. 24-25). As outlined in Claimant's Counsel's brief, and outlined above, proper evaluation of Claimant's pre-existing psychological condition, requires an examination of the "entire evidence," not just one medical opinion. Additionally, proper evaluation of that medical opinion, Dr. Calhoun's, requires an examination of the "entire evidence."

Dr. Calhoun's opinion alone demonstrates that the Industrial accident and related injuries are the predominate cause of Claimant's psychologic condition. The Commission's analysis of Dr. Calhoun's opinion is erroneous, as based on the totality of the evidence it is logically unsound. The Commission rejected Claimant's argument that Claimant's depression is caused 50% by the Claimant's chronic pain condition due the industrial accident and at least 1% caused by Claimant's anger, hostility, resentfulness and dysthymia, resulting in the Industrial accident and injury being the predominant cause of the Claimant's depression. The Commission rejected this argument because it supposed it would require the rejection of Dr. Calhoun's opinion, which it thought well-founded. The Commission also stated it rejected such an argument because Dr. Calhoun specifically rejected such an interpretation of his opinion. (Findings, p. 12). Claimant's

argument does not require a rejection of Dr. Calhoun's opinion; rather it calls for it to be interpreted in light of the entire evidence of the record. Additionally, Dr. Calhoun did not specifically "reject" this interpretation of his opinion; he instead relied upon circular logic to conclude that the Claimant "was given the opportunity to be treated" for any such personality changes due to the accident and/or injury had received treatment, though the Dr. Calhoun at the same time stated that such treatment was ineffective because of the Claimant's mistrust and hostility. (Calhoun Depo., pp. 27-28, ll. 24-11).

Dr. Calhoun opined that 50% of the Claimant's psychological condition was due to the industrial injury. He then stated that the other 50% was due to the Claimant's "personality traits." (Claimant's Exhibit 2, p. 63). In his report Dr. Calhoun does not specify the source of these "personality traits," only following in Consideration/Recommendation 2 of that report does Dr. Calhoun opine, making a legal determination not a medical one, that "thus" the June 13, 2008 injury is not the predominate cause of the Claimant's current depression. *Id.* In his post hearing deposition testimony Dr. Calhoun opined that the Claimant's "mistrust and cynicism, hostility and dysthymia," were a "preexisting pattern." (Calhoun Depo., p. 28, ll. 10-11).

Dr. Calhoun's opinion places two categories of cause to the Claimant's current psychological depressive condition: (1) "Mr Gerdon's industrial accident and subsequent pain disorder" and (2) "Mr. Gerdon's personality traits." (Claimant Exhibit 2, p. 63). Each exactly equally weighted as the cause of the Claimant's current depressive disorder on a 50/50 basis.

Claimant outlined to the Commission and to this Court in his Appellant's Brief that apportioning all of Claimant's personality traits as being a pre-existing cause of the Claimant's

depression is inconsistent not only with the record in its entirety but with the Commission's own Findings of Fact and Conclusions of Law. Employer/Surety asserts that such a reading of the record is taking one portion of Dr. Calhoun's testimony out of context. The portion of Dr. Calhoun's deposition transcript frequently cited by Claimant in his brief is simply the most obvious example of the error committed. Other portions of the record also lead to the same conclusion, including other portions of Dr. Calhoun's testimony.

When discussing the Claimant's evaluation for the WorkSTAR program Dr. Calhoun explained:

> A: Yes. I would just say that while he was in the WorkSTAR program, we were starting to look at his frustration in reaction to pain, his fear of pain and movement. We were also trying to get him to come off some of his pain medications, which was very overwhelming for him. We also addressed his tendency to anticipate the future anxiously and cynically, and then again, bringing that back on how that can exacerbate his pain.
>
> I would say those were the primary issues. And then trying to get him to move away from anger, as far as being such a readily available and frequent emotion for him.
>
> Q: So what causes a person to have these types of issues that Mr. Gerdon was exhibiting?
>
> A: Well, you know some of it certainly was related to the pain itself that he was going through, but also he had, **certainly**, a preexisting propensity toward being hostile or cynical or mistrustful of others.
>
> Q: How do we know that from a clinical sense?
>
> A: Well that was based on the State-Trait Anger Expression Inventory-2 **and then also just in his presentation**. That his anger often seemed to be out of proportion of what was going on at the moment. And his mistrust for what the doctors were trying to move him, he just really got angry about that and reacted very strongly. (Calhoun Depo., p. 12-13, ll. 5-7). [Emphasis added].

Some important elements exist in this exchange. First, the definitiveness of Dr. Calhoun's statement about this pre-existing propensity toward hostility, cynicism and mistrust of others is

important. "Certainly." This definitiveness is an echo of Dr. Calhoun's statement that he was "sure" those around Mr. Gerdon would be able to observe the Claimant's hostility and resentfulness. (Calhoun Depo., p. 33, ll. 20-23). As pointed out to the Commission and to the Court in the prior briefing, those who knew Mr. Gerdon prior to his industrial injury not only did not observe such actions, they observed the exact opposite personality. (Tr. p. 43, ll. 13-17; p. 44 ll. 1-2; p. 57, ll. 1-6; p. 58 ll. 5-6, 12-13).

Second, this opinion was based on testing taken after the industrial injury as well as based on "presentation" which occurred after the industrial injury. Dr. Calhoun is observing a subject, the Claimant, after the event, and drawing conclusions about the state of the subject's condition prior to the event by stating that what he observed existed before the event. The logical analysis of such thought requires the following proposition that Mr. Gerdon presents this way now in testing and observation, so he must have presented this way before the industrial injury. Such a logical analysis is self-creating, and therefore leads to the exclusion of evidence that does not fit within that circle of reasoning. Dr. Calhoun exhibits this same circular logic throughout his testimony.

> Q: Why do you do these types of tests? I mean, you've done these twice on Mr. Gerdon. Why?
>
> A: Well again to look at what the objective tests generate in terms of personality makeup, coping skills, **and then look for patterns over time.**
>
> And what concerns me with Mr. Gerdon is the chronicity of these patternsn, these psychological patterns.
>
> Q: What do the patterns tell you?
>
> A. Just that they likely preexisted his injury. That he was one who was a hostile individual prior to his injury, had anger issues, was **certainly** prone to

> depression, and that just seemed to carry over through many evaluations over the years. Calhoun Depo., p. 27, ll. 10-23.

This selection again emphasizes the Dr. Calhoun's certainty about the observability of the Claimant's mental condition prior to the industrial injury, in this selection that the Claimant was "certainly prone to depression" prior to the industrial injury. *Id.* This is in direct opposition to actual observation of the Claimant prior to the industrial injury. Cody Campbell testified that prior to the industrial injury the Claimant "was optimistic. The most optimist guy I have ever met, actually. Just always trying to talk reason into you and show you the good side of everything." (Tr., p. 48-49, ll. 24-2). This is not someone who was "certainly prone to depression." Dr. Calhoun testified that testing and frequent evaluations were important to look for "patterns over time." The problem with the observations made by Dr. Calhoun was that all of the observations were made after the industrial injury. Dr. Calhoun looked at a re-occurring pattern after an event, the industrial injury, and drew a conclusion about what should exist prior to that event, a continuation of that pattern. However, the evidence in the record, which the Commission found was unrebutted and persuasive, shows that the pattern Dr. Calhoun expected to see did not exist. The pattern had insufficient evidence to reach the conclusion that Dr. Calhoun sought to reach.

Dr. Calhoun addressed this possibility in the passage following the one cited above, but did so referring back again to circular reasoning.

> Q: I mean, is it possible for these tests to be indicating something that was created by his industrial accident?

A: Well I think they could have – certainly, the industrial accident could have exacerbated some of these . . . (Calhoun Depo., pp. 27-28, ll. 24-4).

Here Dr. Calhoun acknowledges that the industrial accident "certainly" could have caused an impact, an aggravation or worsening of the Claimant's personality traits of anger and hostility. In the continuing portion of the passage of testimony Dr. Calhoun enters circular reasoning to minimize such a conclusion.

A: but I think he was given the opportunity to be treated for these things that were related to the industrial injury, but he just couldn't trust enough to respond. He couldn't believe in his medical team, his psychological treatment, enough to respond.
Q: And what do you relate that to?
A: Just those preexisting patterns of mistrust and cynicism, hostility and dysthymia. (Calhoun Depo., pp. 28, ll 4-11).

Dr. Calhoun acknowledges that the industrial accident could change a Claimant's personality. However he asserts that such changes were not at play in the current case because the Claimant got treatment for his industrial injury, but at the same time states the treatment was in effectual because he had a pattern of mistrust, cynicism and hostility, the very conditions which he acknowledge could have been exacerbated by the industrial injury, but weren't because he got treatment, which treatment was ineffectual. Dr. Calhoun's logic follows a circular pattern because it is based on an incomplete pattern, a pattern which only considered evidence observed after the industrial injury. Such a logic construction is erroneous, and reached an erroneous conclusion, that Claimant's personality traits or anger and hostility pre-existed the industrial injury. This conclusion is wrong, and can be tested by looking at Dr. Calhoun's pattern. Dr.

Calhoun's analysis is that he observed a chronic pattern of anger and hostility after the industrial injury, so that must have existed prior to the industrial injury. By examining whether that pattern existed prior to the industrial injury, one can test Dr. Calhoun's conclusion whether the Claimant's personality traits of anger and hostility preexisted the industrial injury and accident.

The Commission found that there was no pre-existing psychological treatment notes to compare with. This leaves the only evidence in the record of the Claimant's psychological condition prior to the industrial injury as the observational testimony of Mickey and Racheal Gerdon, and Jesse and Cody Campbell. Claimant's counsel has outlined and drawn comparisons of this testimony in both Claimant's briefing before the Commission and in Claimant's initial brief before this Court. It is sufficient at this juncture to state that the Commission found "their testimony regarding the **change in Claimant's personality** following his industrial accident [as] **undisputed and persuasive**." (Findings, p. 6). [Emphasis added].

To accept the testimonies of the Campbell's and Gerdon's as undisputed and persuasive and at the same time to accept the pattern laid out by Dr. Calhoun is a logical impossibility because Dr. Calhoun's interpretation of his pattern requires the existence of "certain" and "sure" anger, hostility, mistrust, cynicism and depression observable by those around him prior to the industrial injury. The undisputed testimony is that no such matters were observed, and instead what was observed was "the most optimistic guy I have ever met." Concluding that Claimant's personality traits of anger and hostility, 50% of the cause of his current depression, pre-existed the industrial accident is wrong, it is clearly erroneous. The conclusion that fits the evidence is

the one Dr. Calhoun rejected because it didn't fit his faulty pattern, "the industrial accident could have exacerbated some of these." (Calhoun Depo., p. 28, ll. 3-4).

Claimant agrees with Defendant that 50% of the depression is caused by the pain disorder and 50% is caused by the Claimant's personality traits. However Claimant asserted below to the Commission and to this Court that the totality of the evidence demonstrates that some portion of Claimant's personality traits of anger, hostility, resentfulness and dysthymia are due to the industrial accident and industrial injury. This means that the Industrial accident and industrial injury are the predominant cause of the Claimant's current depressive symptoms, and that the Commission erred by not appropriately considering the totality of the evidence, and therefore reached a conclusion not based on substantial and competent evidence.

B. Dr. Marsh's Testimony and Records Support the Conclusion that the Predominant Cause of the Claimant's Depression is the Industrial Accident and Injury

As stated repeatedly, the Claimant does bear the burden of proving the industrial accident and injury were the predominant cause of the Claimant's psychological condition. However, the Court has also held that "Magic words" are not necessary in addressing causation. Only that "plain and unequivocal testimony conveying a conviction" of causation is offered." ***Jensen v. City of Pocatello***, 135 Idaho 406, 412-13, 18 P.3d 211, 217 (2001). While the burden of proof might be different regarding I.C. § 72-451 injuries, the evidentiary standard for what evidence

should be considered is not. Dr. Marsh expressed a clear and unequivocal opinion regarding the cause of the Claimant's current depression.

The Commission found Dr. Marsh's opinion "credible" but limited due to "its narrow foundation." (Findings, p. 11). Defendants argue that because Dr. Marsh did not use the correct wording in his opinion the opinion is of little value. The Court has always held that it is the substance and basis of the opinion which is important, not wording.

No psychological treatment or testing exists establishing the Claimant's psychological status prior to his 2008 industrial motor vehicle accident. This means when reaching a conclusion regarding causation we must rely upon non-medical evidence that existed at the time, or try and draw conclusions from medical evidence created after the industrial accident and injury. The analysis above shows the danger of relying exclusively on medical evidence created after the industrial accident and injury: conclusions drawn from that evidence are inaccurate when they cannot be correlated with evidence preexisting the accident and injury.

Dr. Marsh states that [he] "spend[s] an inordinate amount of time asking historical questions regarding people's pain and whatnot." (Marsh Depo., p. 8, ll. 14-16.) He also states that it is "very" important to get histories from "folks other than the patients, such as family members." (Marsh Depo.m p. 8, ll. 18-20). He reaffirmed this particularly with psychological concerns.

> [I]ts important, especially when you're talking about people's psychological status and behavior, because a lot of times people aren't sensitive to their own – you know, to how others are perceiving them and, you know how their actions are affecting other people, and so they're just – it helps to have an outside opinion. (Marsh Depo., p. 9, ll. 8-14).

Dr. Marsh treated the Claimant regularly since January 19, 2011. (Marsh Depo., p. 6, ll. 17-18). Dr. Marsh spoke with the Claimant's mother and the Claimant about the Claimant's psychological state regarding both his condition at the time of the examination, as well as prior to the industrial accident and injury. (Marsh Depo., p. 23-26, ll. 18-7).

> You take people they way they come, right? I mean, I'm sure he's -- I did ask him about this at some point, and you, I asked if he'd ever had depression, and you know, what he acted like when he was a kid, and there's no indication, in my mind, that he had a preexisting depressive disorder. So taking somebody like that and then putting them through what he's been through, I think it's only logical that his current psychological states is directly related to his chronic pain. (Marsh Depo., p. 28, ll.

Both the Commission and the Employer/Surety latched on to the language Dr. Marsh used "you take people they way they come" for the proposition that Dr. Marsh's opinion was insufficient regarding a predominant cause standard. Findings, p. 12). The Commission in prior proceedings addressing I.C. § 72-451 acknowledged that the Commission was still required to evaluate the injured worker "as he is" when performing the predominant cause evaluation. ***Quinn v. Doug's Fireplace Sales, Inc***. 2014 IIC 0095.22 citing ***Smith v. Garland Construction Services***, 2009 IIC 0179.8. This court affirmed in ***In Warren v. Williams & Parson PC CPAS***, 157 Idaho 528, 337, P.3d 1257 (2014) that an employer/surety takes the employee "as he is, in determining the predominant cause of a psychological condition."

Based on Dr. Marsh's regular treatment of the Claimant, the histories obtained, and his professional experience, Dr. Marsh's is of the clear and unequivocal opinion that the industrial accident and injury were the cause of the Claimant's current depression, and that Claimant did

not have a pre-existing depressive disorder. This is consistent with the "undisputed and persuasive" testimony of those who observed the Claimant prior to the industrial accident and injury.

Finding Dr. Marsh's opinion was narrow in foundation and inapplicable because it did not use specific "magic words" is in error and not based on the evidence in the record.

C. The Court has Sufficient Evidence to Decide the Matter

Remand is not necessary as the evidence of the Claimant's pre-existing mental status is clear based on the testimony and evidence in the record. It was clear enough that the Commission found it "undisputed and persuasive." (Findings, p. 6). Where such factual evidence is undisputed it should direct the findings of causation.

Should the Court determine to so find, it is important to also address, as Claimant presented to the Commission, that I.C. § 72-451(5)'s diagnosis requirement is specific to issues of impairment and disability. In the present case, the parties were very specific to limit the matter before the Commission as one of medical treatment. (Tr., p. 7-8, ll. 6-10.). Following the rules of statutory interpretation the plain meaning of the wording of the statute is to be given meaning. ***Payette River Prop. Owners Ass'n v. Bd. of Comm'rs of Valley County***, 132 Idaho 551, 557, 976 P.2d 477, 483 (1999). The Supreme Court has also routinely stated that "the terms of Idaho's worker's compensation statue are liberally construed in favor of the employee." ***Haldiman v. Am. Fine Foods***, 117 Idaho 955, 956-57, 793 P.2d 187 (1990). This all means that

§72-451(5)'s limitations are only applicable in those cases where the Claimant is seeking permanent impairment and permanent disability. This is especially true since the matters of impairment were already before the Commission in a prior proceeding and decided.

The Court has sufficient evidence before it to decide the compensability of Mr. Gerdon's psychological treatment, recommended by both Dr. Calhoun and Dr. Marsh.

D. Matters not Raised by the Parties are not to be Considered

The Court has been unequivocal in ruling that "when reviewing the decision of the Commission, this Court is 'limited to the evidence, theories and arguments' that were presented to the Commission below . . . Consequently, we 'will not consider arguments raised for the first time on appeal.'" ***Serrano v. Four Seasons Framing***, 157 Idaho 309, 315, 336 P.3d 242 (2014) (quotations original) (citations omitted). As in this case, the Court has had occasion to reaffirm that when a surety fails to raise an argument before the Commission, "It is well established that arguments raised for the first time on appeal will not be heard." ***Combs v. Kelly Logging***, 115 Idaho 695, 698, 769 P.2d 572 (1989) (citations omitted) (emphasis added).

Before the Industrial Commission the Employer/Surety did not argue or raise any issue or claim preclusion. "Defendants have not raised claim or issue preclusion as a defense to this claim for psychological treatment. Therefore this issue will not be addressed." Findings p., 7., citing ***Deon v. H&J Inc.***, 157 Idaho 665, 339 P.3d 550 (2014). As the Court laid out in ***Deon*** to

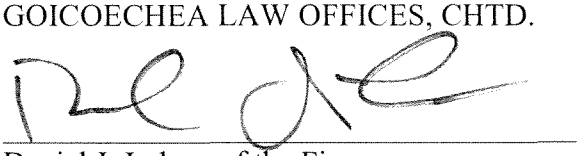
do so *sua sponte* would be in err. Additionally it would be in applicable as the evidence and testimony demonstrate that the Claimant is seeking for treatment which arose, while due to the industrial injury, since the last hearing on this matter. (Claimant's Exhibit 3, p. 33).

III. CONCLUSION

The Commission committed error by not relying upon the whole record, especially those elements it found to be "undisputed and persuasive" in reaching its conclusion. By doing so the Commission reached a conclusion which was not supported by substantial and competent evidence, and is clearly erroneous. As it is clearly erroneous the matter should be reversed and the Court should find compensable the treatment sought by the Claimant.

DATED this 4 day of November, 2015.

GOICOECHEA LAW OFFICES, CHTD.



Daniel J. Luker- of the Firm
Attorneys for Claimant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 4 day of November, 2015, I caused to be served two (2) true and correct copies of the foregoing ***APPELLANT'S REPLY BRIEF*** by the method indicated below, and addressed to the following:

Joseph M. Wager
LAW OFFICES OF KENT W. DAY
P.O. Box 6358
Boise, Idaho 83707

( ) Hand Delivery
(✓) US Mail
( ) Overnight Mail
( ) Facsimile: (800) 972-3213

GOICOECHEA LAW OFFICES, CHTD.